

No. 14,078

United States Court of Appeals
For the Ninth Circuit

WEST COAST PRODUCTS CORPORATION,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corpo-
ration,
Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

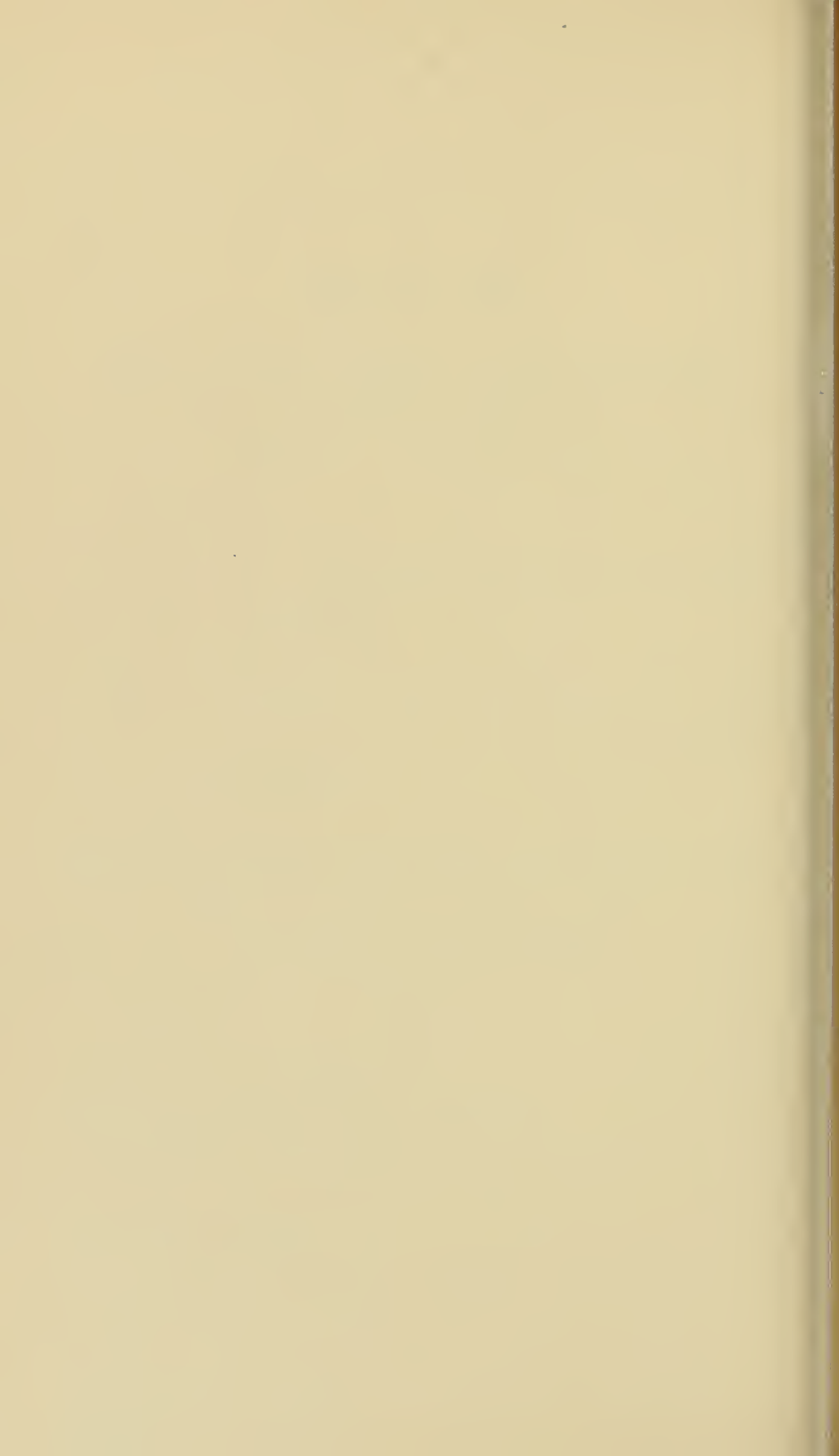
REPLY BRIEF FOR APPELLANT.

ALBERT PICARD,
405 Montgomery Street, San Francisco 4, California,
Attorney for Appellant.

FILED

APR 19 1954

PAUL P. O'BRIEN
CLERK



No. 14,078

**United States Court of Appeals
For the Ninth Circuit**

WEST COAST PRODUCTS CORPORATION, vs. SOUTHERN PACIFIC COMPANY, a corpo- ration, <i>Appellant,</i>	<i>Appellee.</i>
---	------------------

Appeal from the United States District Court for the Northern
District of California, Southern Division.

REPLY BRIEF FOR APPELLANT.

EVIDENCE.

In its summary of evidence the appellee has been substantially correct but has committed two errors which we believe are material.

In quoting from page 105 of the transcript the appellee states that while Mr. Paoni stated in his testimony that the height of the liquid in the barrel was 6 to 8 inches (Tr. 99) at page 105 of the transcript he says there were 6 inches of liquid in the bottom of the containers. This is incorrect as Mr. Paoni stated

there was "about 6 inches of liquid", which conformed with his previous testimony.

In the summary of the evidence the appellee further states that at page 129 of the transcript Mr. Rempel stated that simply coating a ripe olive with olive oil without salt-curing would result in its spoiling from bacterial decomposition. The testimony of Mr. Rempel in that regard actually was that simply coating a ripe olive with olive oil *without doing anything else at all* would result in its spoiling, which is entirely different from treating salt-curing as the only means of preservation.

ARGUMENT.

The appellee has gone to very great length in working out an elaborate distinction as to the various manners of preservation and endeavors to treat the type of olives which come under Item 3800 as being *solely* preserved in olive oil, and disregards the fact that while the olives may be salt cured, still the olive oil could be used as a preservative, and concludes by stating that the only reasonable conclusion is that the olives are not in a preservative when they are coated with oil and a quantity of water, even though that quantity of water and oil consists of more than one-fourth of the contents of the container.

This elaborate theory of appellee to maintain its position is obviously incorrect.

Item 3800 provides that olives, canned or preserved in juice or in syrup, or in liquid other than alcoholic, come under that item. All of the testimony in the case clearly shows that the oil placed on the olives and the liquid formed therefrom acted as a preservative of the olives in question. There is nothing in Item 3800 which states that it must be the sole preservative. The testimony of Mr. Paoni and Mr. Rempel clearly shows that the use of olive oil and the formation of liquid covering 6 to 8 inches of the height of 23 inches of the barrel prevented mold from taking place on the olives. This undoubtedly preserved the olives in juice or in liquid other than alcoholic and brings the case within Item 3800.

CONCLUSION.

On the basis of the foregoing it is respectfully submitted that the judgment of the trial Court should be reversed and upon the undisputed evidence judgment should be ordered in favor of the defendant.

Dated, San Francisco, California,

April 14, 1954.

Respectfully submitted,

ALBERT PICARD,

Attorney for Appellant.

